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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ROBERTSON STEPHENS AND CO.,
Petitioner,
v.
TONYJA DUFFIELD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*.[1] Letters of consent from all parties have been filed with the Clerk of this Court. The brief supports the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

EEAC is an association of employers formed in 1976 to promote sound programs to end employment discrimination. Its members include more than 300 of the nation's largest private employers. Its directors and officers include many of industry's leading experts on equal employment opportunity (EEO) and affirmative action, whose combined experience gives EEAC valuable insight into the practical and legal aspects of EEO policies and practices.

[1] Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity other than the *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief.

EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and other EEO laws. Many EEAC member companies have contracts with their employees governing some or all terms and conditions of employment. Many such contracts contain provisions requiring arbitration of employment-related claims and disputes.

EEAC's members have an ongoing interest in preserving the enforceability of agreements calling for arbitration of employment-related disputes. Arbitration provides a fair, efficient, and effective means of resolving discrimination claims and other employment-related issues that otherwise would clog the courts. Because of its interest in this subject, EEAC has filed *amicus curiae* briefs in numerous cases supporting the enforceability of arbitration agreements, as well as many other important issues of employment law.[2]

STATEMENT OF THE CASE

In 1988, Tonyja Duffield began working for Robertson Stephens & Co., a securities brokerage firm. As a securities trader, Duffield was required as a condition of her employment (and to comply with federal laws) to sign registration documents that included an agreement to arbitrate "any dispute" with her employer (including disputes arising out of employment or termination of employment). In 1995, Duffield filed suit against Robertson Stephens in federal court, claiming sex discrimination and sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII).

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[2] *E.g. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Wright v. Universal Maritime Service Corp.*, No. 97-889 (U.S.) (decision pending); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 U.S. 432 (1996); *Great Western Mortg. Corp. v. Peacock*, 110 F.3d 222 (3d Cir.), *cert. denied*, 118 S. Ct. 299 (1997); and *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998).

The district court rejected Duffield's arguments that her arbitration agreement was not enforceable as to her Title VII and state law claims, but certified the issues raised for immediate appeal to the Ninth Circuit. The Ninth Circuit ruled that, under the Civil Rights Act of 1991, employers may not compel individuals as a condition of employement to waive the right to a judicial forum to resolve Title VII claims. Robertson Stephens has petitioned this Court for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Whether an individual may be compelled, as a condition of employment, to submit statutory civil rights claims to arbitration is a frequently litigated question. Even as opponents of such arrangements renew challenges to what ought by now to be a settled area of law, courts have been rejecting categorical attacks on arbitration more surely and swiftly—until *Duffield*. In a single, sweeping decision with significant ramifications inside and out of the securities industry, the Ninth Circuit set arbitration law back seven years.

This Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), created a rebuttable presumption that "statutory claims may be the subject of an arbitration agreement . . . 'unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* at 26 (citation omitted). Although *Gilmer* involved a claim under the Age Discrimination in Employment Act (ADEA), several courts of appeals correctly have viewed *Gilmer* as expressing this Court's endorsement of arbitration for all statutory civil rights claims, including those arising under Title VII.[3]

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[3] *See, e.g., Patterson v. Tenet Healthcare*, 113 F.3d 832 (8th Cir. 1997); *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Austin v. Owens-Brockway Glass Container*, 78 F.3d 875 (4th Cir. 1996), *Hirras v. National R.R. Passenger Corp.*, 10 F.3d 1142 (5th Cir.), *vacated and remanded on other grounds*, 512 U.S. 1231 (1994); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*,

The Ninth Circuit's decision below was the first federal appeals' court decision to hold, as a matter of law, that claims arising under Title VII cannot be subjected to "compulsory" arbitration. Though arguably *Duffield* already conflicted with the many circuit court opinions enforcing agreements to arbitrate Title VII disputes, a month after the Ninth Circuit's decision the Third Circuit squarely rejected *Duffield* and its rationale. *See Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175 (3d Cir. 1998). *Seus* thus underscores the existence of a direct conflict among the circuits on the arbitrability of Title VII claims under a mandatory, pre-dispute agreement.

Moreover, the Ninth Circuit's decision threatens the continued use of the valuable tool of mandatory arbitration as a means of resolving employment disputes. As the number and cost of employment-related lawsuits has increased, employers nationwide have sought viable, legitimate ways to identify workplace problems early, and resolve them without lengthy, acrimonious litigation. Arbitration, often the final step in a multi-stage process, has met with growing acceptance as an efficient, cost-effective method that is fair to all concerned.

Under *Duffield*, however, the enforceability of an arbitration agreement now will depend on whether a dispute arises under Title VII, and whether the dispute arises inside or outside of the Ninth Circuit. Faced with such a conflicting and complicated system, some employers may abandon arbitration altogether. The "liberal federal policy favoring arbitration" embodied in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, would not be served by such a result. *Gilmer*, 500 U.S. at 25. Indeed, Congress and the courts have long recognized that arbitration can "serve as therapy for the ailment of the crowded docket." *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990). Given the judiciary's overwhelming caseload, such "therapy" has never been more appropriate and necessary.

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939 F.2d 229 (5th Cir. 1991) (on remand, following *Gilmer*); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992).

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S HOLDING, THAT THE 1991 AMENDMENTS TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PRECLUDE MANDATORY ARBITRATION OF TITLE VII DISPUTES, IS A CRITICAL BREAK WITH THE MANY FEDERAL CIRCUITS THAT HAVE APPLIED THIS COURT'S *GILMER v. INTERSTATE/JOHNSON LANE CORP.* RULING TO AUTHORIZE ARBITRATION FOR RESOLVING CIVIL RIGHTS DISPUTES

A. The Ninth Circuit's Holding Is in Conflict With This Court's Approach to Arbitration in *Gilmer*—The Foundation of Lower Courts' Decisions Involving Statutory Civil Rights Claims Since 1991

1. *The Ninth Circuit Diverged Considerably From the Inquiry Required by This Court's Arbitration Cases*

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, provides that a written contract "to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at § 2. This Court declared in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that a claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, "can be subjected to compulsory arbitration pursuant to an arbitration agreement," 500 U.S. at 23, and that the provisions of the FAA "manifest a 'liberal federal policy favoring arbitration agreements.'" *Id.* at 25 (citation omitted).

"'Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Gilmer*, 500 U.S. at 26 (*quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985).[4] In making the determination

[4] Even the Ninth Circuit itself followed *Gilmer* in Title VII cases prior to *Duffield*. *See Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303

whether Congress has evinced an intent to preclude a waiver of a judicial forum, this Court has said that:

> the burden is on [the party challenging the agreement] to show that Congress intended to *preclude* a waiver of a judicial forum. . . . If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an "inherent conflict" between arbitration and the [statute's] underlying purposes. *Throughout such an inquiry*, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."

Gilmer, 500 U.S. at 26 (citations omitted) (emphasis added).

While the "intent to preclude" inquiry is tailored to the text and history of the specific statute at issue, the "importance" of the statutory right at issue is not dispositive—if even material—to the inquiry under the FAA. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (federal age discrimination claim); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); and *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) (noting that "the Supreme Court has seldom found congressional intent to preclude such a waiver, and has enforced contracts to arbitrate claims under the Sher-

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(9th Cir. 1994) ("Our circuit has extended Gilmer to employment discrimination claims brought under Title VII."), *cert. denied*, 516 U.S. 812 (1995), and *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (holding that "[a]lthough Gilmer involved a claim under the . . . ADEA, rather than the Title VII claim brought by Mago, both statutes are similar in their aims and substantive provisions. Therefore, we conclude that Mago has not met her burden of showing that Congress, in enacting Title VII, intended to preclude arbitration of claims under the Act.") (internal citations omitted). Both of these cases were decided after enactment of the 1991 Civil Rights Act.

man Act, the Racketeer Influenced and Corrupt Organizations Act, and the Securities Exchange Act of 1934.").

The question a court must answer is not whether Congress thought the protected rights (in this case Title VII rights) were *important*, but whether Congress expressed a belief that the protected rights were so unique that arbitration could not be relied upon as a means of resolving statutory claims, and thus exempted such claims from the reach of the FAA. As the Fourth Circuit observed in its own discussion in *Gilmer*:

> Courts cannot determine whether arbitration agreements are to be enforced by making subjective judgments as to the relative importance of various federal statutes. Rather, Congress must provide clear guidance if it wishes federal courts to refrain from enforcing arbitration agreements when violations of a particular statutory right are alleged.

Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 198, 203 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991).

Despite clear direction from this Court to evaluate arbitrability in light of a strong federal policy favoring arbitration, the Ninth Circuit ruled that a claim under Title VII cannot be subjected to "compulsory" arbitration.[5] In so doing, the Ninth Circuit diverged from accepted judicial interpretation of the FAA, vis-a-vis statutory rights, when it declared—without reference to any authority—that "in examining congressional legislation, it is now incumbent upon courts to consider whether Congress intended to preclude every form of arbitration of claims arising under a particular statute, or whether it intended to preclude only certain forms of arbitration agreements"—*e.g.*, compulsory arbitration agreements. *Duffield*, 144 F.3d at 1189.

The Ninth Circuit's distinction between acceptable Title VII arbitration and unacceptable (*i.e.*, "compulsory")

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[5] The Ninth Circuit used the term "compulsory arbitration" to refer to pre-dispute arbitration agreements required by employers as a condition of employment. *Duffield*, 144 F.3d at 1187.

Title VII arbitration is a variation on the line of argument this Court rejected in *Gilmer*, namely, that an arbitration agreement that is the product of unequal bargaining power is unenforceable. The Ninth Circuit apparently viewed "compulsory" arbitration as the result of unequal bargaining power. But this Court already has declared that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Gilmer*, 500 U.S. at 33.

2. *The Ninth Circuit Failed to Address Critical Indicators of Congressional Intent Under This Court's* Gilmer *Framework*

The *Duffield* court's approach to determining whether a statutory Title VII claim can be arbitrated pursuant to the FAA incompletely applied the framework established by this Court in *Gilmer*. The text of the 1991 Civil Rights Act encourages arbitration and was adopted at a time when civil rights actions clearly were arbitrable according to this Court. Section 118 of the Civil Rights Act of 1991 states, in relevant part:

> Where *appropriate* and *to the extent authorized by law*, the use of alternative means of dispute resolution, including . . . arbitration, is *encouraged* to resolve disputes arising under the Acts or provision of Federal law amended by this title.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (codified at 42 U.S.C. § 1981 note (emphasis added)).

Rather than concluding, as has every other circuit,[6] that Section 118 obviates any further inquiry into Congress' intent with respect to the arbitrability of Title VII disputes, the Ninth Circuit declared the statutory language "ambiguous" and turned to the 1991 Act's legislative history for evidence of a congressional intent to preclude a waiver of a judicial forum. The Ninth Circuit's decision

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[6] The rulings of other courts on the text of Section 118 of the Civil Rights Act of 1991 are discussed *infra* in Section I.B.

to shun the statutory text of Section 118 that already has been construed by several sister circuits is highly questionable. *Cf. Cole*, 105 F.3d at 1472 ("In a case such as this, where the statutory text does not admit of serious ambiguity, and where firmly established case law is absolutely clear on the meaning of the statute, legislative history is, at best, secondary, and, at worst, irrelevant") (*citing Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-09 n.3 (1989)).

Congress passed and President Bush signed the 1991 Civil Rights Act after this Court handed down its decision in *Gilmer*. As such, the Act must be read as adopting *Gilmer's* endorsement of arbitration for resolving statutory civil rights claims. *See Faragher v. Boca Raton*, 118 S. Ct. 2275, 2286 (1998) (the "presumption that Congress was aware of [prior] judicial interpretations and, in effect, adopted them" enhances the precedential effect of this Court's opinions not modified by the 1991 Civil Rights Act) (citation omitted).

Moreover, even if the Ninth Circuit were justified in resorting to legislative history for indicators of Congressional intent, Congress' actions subsequent to the 1991 Act foreclose whatever inference the Ninth Circuit gleaned from statements surrounding the Act's passage suggesting that mandatory arbitration of Title VII claims was prohibited by the Act. "[C]ourts should not strain to find in statutes what Congress has not put there." *Gilmer*, 895 F.2d at 202. Opponents of mandatory arbitration repeatedly have introduced in Congress unsuccessful proposals that would prohibit mandatory arbitration of statutory claims as a condition of employment. Such "anti-*Gilmer*" bills, introduced in 1997, 1996, 1995 and 1994, establish that Congress has not prohibited mandatory arbitration of statutory claims. *See, e.g.*, Civil Rights Procedures Protection Act of 1997, H.R. 983 & S. 63, 105th Cong.[7]

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[7] *See also* Civil Rights Procedures Protection Act of 1996, H.R. 3748, 104th Cong.; Civil Rights Procedures Protection Act of 1995, S. 366, 104th Cong.; Civil Rights Procedures Protection Act of 1994, H.R. 4981 & S. 2405, 103d Cong.

The Ninth Circuit neglected to address the significance of these failed legislative proposals. *See, e.g., Golenia v. Bob Baker Toyota*, 915 F. Supp. 201, 205 (S.D. Cal. 1996) (noting that bills pending in Congress to amend civil rights statutes [including Title VII] that would make mandatory, pre-dispute arbitration agreements illegal "would be meaningless" if such agreements already were banned by the 1991 Civil Rights Act). A conclusive ruling is needed from this Court to make clear that Congressional intent to preclude mandatory arbitration of civil rights claims cannot be inferred from the text or conflicting legislative accounts of the 1991 Civil Rights Act, particularly where explicit proposals to reverse the current presumption of enforceability have gone unenacted.

B. The Ninth Circuit's Decision Has Created Significant Differences of Decisional Law Among the Circuits on an Important Federal Question

As this Court has directed, in the absence of a *clear* indication of congressional intent to preclude arbitration of a particular statutory dispute, the Federal Arbitration Act commands that parties abide by their agreements to arbitrate even statutory claims. *See Gilmer*, 500 U.S. at 26. Taking the command of this Court and the FAA seriously, most lower courts have enforced agreements to arbitrate employment related controversies involving Title VII claims.[8]

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[8] One district court has taken the same flawed path as the Ninth Circuit in *Duffield*. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 995 F. Supp. 190 (D. Mass. 1998) (refusing to order arbitration of Title VII claims, based on the court's reading of the legislative history of the 1991 Civil Rights Act), *appeal pending*, No. 98-1246 (1st Cir. 1998). The *Rosenberg* case presently is on appeal to the First Circuit. The First Circuit already has ruled that the language in the Americans with Disabilities Act, which is identical to the language used in Section 118 of the 1991 Civil Rights Act, is sufficient evidence that Congress did *not* intend to preclude mandatory arbitration of a statutory dispute. *See Bercovitch v. Baldwin Sch.*, 133 F.3d 141, 148-50 (1st Cir. 1998) ("[t]he meaning of this language, far from evidencing an intention to preclude arbitration, can only be interpreted as favoring it," referring

For example, the following circuit courts have viewed agreements to arbitrate Title VII claims as a natural extension of *Gilmer*, finding no material distinction between ADEA claims and Title VII claims. *See Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1467-68, (D.C. Cir. 1997) ("in this [Title VII] case, we are constrained by *Gilmer* to find the arbitration agreement enforceable."); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (pre-*Duffield*) ("[a]lthough Gilmer involved a claim under the . . . ADEA, rather than the Title VII claim brought by Mago, both statutes are similar in their aims and substantive provisions.") (internal citations omitted); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307 (6th Cir. 1991) (Title VII claim), *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (on remand, following *Gilmer*, Title VII claim).

Additionally, several circuit courts have read the statutory text of Section 118 of the 1991 Civil Rights Act as an *explicit* basis for concluding that Congress did *not* intend to preclude a waiver of judicial resolution of Title VII claims.[9] *See Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182 (3d Cir. 1998) ("On its face, the text of § 118 evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration."); *Patterson v. Tenet Healthcare*, 113 F.3d 832, 837 (8th Cir. 1997) ("Moreover, the arbitrability of Title VII claims finds support in [§ 118 of] the Civil Rights Act of 1991"); *Austin v. Owens-*

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to 42 U.S.C. 12212). *See also Miller v. Public Storage Mgmt.*, 121 F.3d 215, 218 (5th Cir. 1997) ("The explicit language of the ADA advocates the use of alternative resolution . . . . [and] persuasively demonstrates Congress did not intend to exclude the ADA from the scope of the FAA.").

[9] The burden is on the *opponent* of arbitration to establish that Congress intended to *preclude* arbitration of the claim at issue. *Gilmer*, 500 U.S. at 26. The party seeking to enforce arbitration need not establish that arbitration explicitly is authorized by the statute, because the FAA establishes a presumption of arbitrability. *Id.*

Brockway Glass Container, 78 F.3d 875, 881 (4th Cir.) ("The language of the [Civil Rights Act of 1991] could not be any more clear in showing Congressional favor towards arbitration."), *cert. denied*, 117 S. Ct. 432 (1996); *Hirras v. National R.R. Passenger Corp.*, 10 F.3d 1142, 1146 (5th Cir.) ("there exist no federal or congressional policies prohibiting submission of [Title VII] claims to arbitration. Indeed [Section] 118 of the 1991 Civil Rights Act encourages the use of . . . arbitration."), *vacated and remanded on other grounds*, 512 U.S. 1231 (1994).

The Ninth Circuit's decision below is the first by a federal circuit court to exclude Title VII disputes categorically from mandatory arbitration under an otherwise FAA-enforceable arbitration agreement. Within a month of the Ninth Circuit's ruling, the Third Circuit confirmed expressly that the Ninth Circuit decision creates a significant difference of decisional law on an important federal question. In *Seus*, the Third Circuit ruled that neither Title VII, nor the amendments to Title VII in the 1991 Civil Rights Act, precluded mandatory arbitration agreements covering Title VII claims, even when such agreements are made as a condition of employment. *Seus*, 146 F.3d at 182-3. On the contrary, the Third Circuit determined that Section 118 of the 1991 Civil Rights Act reveals a clear Congressional intent to *encourage* arbitration of such claims. *Id.* at 182. The Third Circuit likewise rejected *Duffield*'s reading of the legislative history of the 1991 Civil Rights Act, stating that "no amount of commentary from individual legislators or committees would justify a court in reaching the result the EEOC would have us reach." *Id.*[10]

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[10] The reasoning of Justice Scalia, concurring, in *Thompson v. Thompson*, 484 U.S. 174, 188, 191-192 (1988), should apply: "Committee reports, floor speeches, and even colloquies between Congressmen, . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.'" *See also Owens-Brockway*, 78 F.3d at 882 ("[e]ven if the provisions of the legislative history are contrary to the statute, the statute must prevail.").

As the foregoing discussion illustrates, the Ninth Circuit has departed significantly from this Court's *Gilmer* analysis, and from the consistent rulings of the other federal circuits on the significance of the 1991 Civil Rights Act's impact on the arbitrability of Title VII claims. In so doing, the Ninth Circuit now has obscured what had been a clear and consistent development at the circuit court level of case law harmonizing the Federal Arbitration Act with the resolution of statutory disputes. As discussed in the next section, the *Duffield* ruling, if left to stand, will threaten the effective use of arbitration as an alternative dispute resolution mechanism nationwide.

II. THE NINTH CIRCUIT'S DECISION HAS UNDERMINED *GILMER*-STYLE MANDATORY ARBITRATION FOR ALL EMPLOYMENT DISPUTES INSIDE AND OUTSIDE THE NINTH CIRCUIT, BY COMPLICATING NATIONAL EMPLOYERS' ADMINISTRATION OF ALTERNATE DISPUTE RESOLUTION PROGRAMS TO SUCH AN EXTENT THAT THE RULING MAY, *DE FACTO*, END SUCH USEFUL PROGRAMS PREVIOUSLY SANCTIONED BY THIS COURT IN *GILMER*.

A. The Ninth Circuit's Decision Detracts From the Efficiencies of Uniform Alternative Dispute Resolution Programs

As the preceding sections illustrate, the Ninth Circuit's reading of the 1991 Civil Rights Act and the FAA now precludes enforcement of mandatory, pre-dispute arbitration agreements to resolve Title VII claims asserted by individuals employed within the nine states covered by the Ninth Circuit. Such agreements currently are legal and enforceable for Title VII claims elsewhere in the country.[11] Furthermore, such agreements currently are

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[11] As noted *supra*, Section I.B., a decision by the District of Massachusetts holding that the 1991 Civil Rights Act amendments preclude arbitration of Title VII disputes is pending on appeal before the First Circuit. The First Circuit, however, has endorsed mandatory arbitration under statutory language in the Americans with Disabilities Act identical to the language in the 1991 Civil

legal and enforceable even within the Ninth Circuit for statutory disputes other than Title VII claims. *See, e.g., Kuehner v. Dickinson & Co.*, 84 F.3d 316 (9th Cir. 1996) (FLSA claim arbitrable). By carving out an unprecedented—and unwarranted—exception from the FAA for Title VII claims, the *Duffield* decision has all but destroyed the certainty and uniformity employers operating within the Ninth Circuit hoped to obtain by entering into agreements with their employees to arbitrate employment-related disputes.

Some employers, including a number of EEAC's members, have adopted alternative dispute resolution programs in the last several years that include mandatory arbitration as the final step in a multi-step internal dispute resolution process. They have done so with growing confidence in the trend among federal courts to enforce arbitration agreements uniformly for all statutory disputes. Employers' confidence in adopting mandatory arbitration as an alternative to litigation was well placed, if, in fact, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Gilmer*, 500 U.S. at 36, *quoting Mitsubishi*, 473 U.S. at 626-627.

The Ninth Circuit alone has adopted an unworkable subjective test for determining when, if ever, employers can enforce agreements to arbitrate Title VII claims. The *Duffield* court interpreted the language in Section 118 of the 1991 Civil Rights Act that arbitration is encouraged "[w]here appropriate" to mean "where arbitration . . . afford[s employees] . . . an opportunity to present their claims in an alternative forum, . . . that they find *desirable*." *Duffield*, 144 F.3d at 1194. The implication is that only through voluntary, rather than compulsory, arbitration agreements, can employees express this desire.

Rights Act regarding alternative dispute resolution. All other circuits have enforced mandatory agreements to arbitrate Title VII disputes, as discussed *supra*, Section I.B.

The EEOC, *amicus curiae* for *Duffield* in the case below, also has advanced the position that the civil rights statutes the Commission enforces permit only "voluntary" agreements to arbitrate.[12] In fact the EEOC's official position on *Gilmer* is that "[t]he Gilmer decision is not dispositive of whether employment agreements that mandate binding arbitration of discrimination claims are enforceable." EEOC, Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment 2 n.2 (1997).

The *Duffield* decision, obviously contrary to *Gilmer*, if left to stand, will give the EEOC unwarranted precedent to engage in further litigation against employers that use the very types of arbitration agreements for resolving statutory disputes that were blessed by this Court in *Gilmer*. Moreover,

> If arbitration were voluntary th[e] balance of interests [favoring adoption of an arbitration system] disappears—the more litigious applicants and employees would continue to seek judicial recourse in the hopes of a large jury award while those who might not normally pursue litigation would now likely seek arbitration. Needless to say, this would destroy the employer's incentive for implementing arbitration agreements.

Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, Dispute Resolution J., Fall 1997, at 19, 22.

In addition to contravening *Gilmer*, a subjective or voluntariness standard for determining when to enforce an agreement to arbitrate would destroy the uniformity of ADR programs, making arbitration agreements en-

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[12] Presumably, if only "voluntary" agreements to arbitrate were contemplated by the FAA, there would be no provision in the Act for seeking an order to stay judicial proceedings or compel arbitration, 9 U.S.C. §§ 3, 4—because parties "volunteering" to arbitrate would never disagree over whether they agreed to settle their dispute by arbitration.

forceable for some employees, but not others in a particular workforce. The transactional costs involved in requiring employers to maintain conflicting or competing dispute resolution systems undoubtedly would lead some employers to abandon arbitration altogether. As Professor Samuel Estreicher notes:

> [a] dispute resolution system, like a pension plan, is what economists call a "collective" or "public" good. It is efficiently provided, if at all, on a collective basis. This is because the costs of such a program (an in-house claims processing office, ombudspersons, possible mediators, etc.), even when justified by the collective benefits to the affected employees, typically exceed the benefits to individual employees. Piecemeal application of a dispute resolution program could threaten to unravel the program for all other similarly situated employees.

Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. Rev. 1344, 1359 (1997).

The threat of administering inconsistent dispute resolution programs is not merely academic. A recent news story detailing the highly publicized settlement of a Title VII case against Wall Street giant Salomon Smith Barney reports that

> the chief beneficiaries of the change are class members covered by a decision of the U.S. Court of Appeals for the Ninth Circuit in *Duffield v. Robertson Stephens & Co.*, which rejected the securities industry's system of compulsory arbitration of employment claims.

Judge Approves Smith Barney Agreement After Changes Made to Satisfy Concerns, Daily Lab. Rep. (BNA), Jul. 28, 1998, at A-13, 14. Thus, similarly situated employees of the same company will have different avenues of redress for statutory civil rights claims open to them, simply by virtue of their geographic location.

B. Clear Guidance From This Court Is Needed to Preserve the Proven Benefits of Arbitration

Alternative dispute resolution, "encouraged" by the 1991 Civil Rights Act, including arbitration, benefits both employers and employees, and gives the parties an opportunity to avoid harm in the early stages of conflict. Not surprisingly, by making it easier for employees to raise disputes, arbitration gives management early notice of sensitive issues in the workplace and the opportunity to respond to problems more promptly and effectively.

As this Court observed just three months ago:

> Although Title VII seeks "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), its "primary objective," like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm. *Id.*, at 417," . . . It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty."

Faragher v. Boca Raton, 118 S. Ct. 2275, 2292 (1998). Employers have adopted internal complaint resolution systems, which include arbitration, to identify and remedy workplace disputes.

Moreover, traditional court processes are not equally accessible, or at least not equally effective, for all employees seeking to resolve discrimination claims. For example, the Commission on the Future of Worker-Management Relations (Dunlop Commission) found disparities in the demographic profile of employees that actually litigate employment disputes, noting such plaintiffs "come from the ranks of managers and professionals rather than lower level professionals." Dunlop Commission, Report and Recommendations of the Commission on the Future of Worker-Management Relations Report 25 (1994). As

one observer comments, "[r]ightly or wrongly, many applicants and employees are extremely concerned about the prospect of being characterized as litigious or anti-employer and are much more likely to bring workplace issues forward in a private setting." Oppenheimer & Johnstone, *supra*, at 23.

"Congress passed the Federal Arbitration Act . . . to help legitimate arbitration and make it more readily useful to disputants. The hope has long been that the Act could serve as therapy for the ailment of the crowded docket." *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989). Viewing the strong endorsements of arbitration by Congress and this Court against an ominous backdrop of the current, overwhelming federal caseload, such "therapy" is more appropriate and necessary now than ever.

In the private sector, the use of ADR was "spurred in the early 1990s by a dramatic increase in the number of discrimination complaints, along with the costs, time, and frustration involved in attempting to resolve them." U.S. General Accounting Office, Rep. No. GAO/GGD-97-157, Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace 7 (1997). The EEOC already is unable to keep up with the crush of statutory employment charges it receives, carrying a backlog of nearly 58,000 charges. *See* EEOC, *EEOC Pending Inventory Drops Below 58,000 in Third Quarter F/Y 1998* (last modified Aug. 12, 1988) <http://www.eeoc.gov/press/8-1298.html>. When the EEOC issues right-to-sue letters rather than investigating each claim thoroughly, it passes its caseload to the already over-burdened federal court system.[13] Indeed, in the EEOC's own words, "the

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[13] Courts simply cannot afford to foreclose the alternative of arbitration. Between 1969 and 1990, employment claims filed in federal court increased by over two thousand percent. Federal Courts Study Committee, Report of the Federal Courts Study Committee 61 (1990). Since 1990, the number of such claims has tripled. Source: Statistics Division, Administrative Office of U.S. Courts. To compound matters, increases in the total number of federal judgeships

agency's pending inventory of discrimination charges has been sliced nearly in half down from approximately 110,000 charges in fiscal year (FY) 1997 to 57,871 . . . ." *Id.* Title VII charges represent between 74% (1995) and 77% (1997) of the EEOC's charge inventory. *Id.* In the years that the EEOC was "slicing" its charge inventory in half, the majority of Title VII charges resulted in actions that entitled the charging parties to pursue private court suit.[14]

Arbitration provides an extrajudicial means by which disputes that typically arise in the employment setting can be resolved in a more efficient and less expensive manner, without further burdening our overcrowded court system.

> The reasons favoring arbitration are as wise as they are obvious: litigation is costly and time consuming . . . . By bringing together persons actually involved in the workplace, often assisted by a neutral arbitrator experienced in such matters, disputes are resolved swiftly and cheaply. This mechanism . . . provides a swift, fair, and inexpensive remedy.

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 747-48 (1981) (Burger, C.J., dissenting).

As Chief Justice Warren Burger recognized some 17 years ago, "people's patience with the judicial system is wearing thin." *Id.* at 752. The process of administrative investigation by the EEOC and litigation may take years to complete. "By the time of trial, the perceptions of

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have not kept pace with court filings. In 1974, the number of cases filed per district court judgeship was 358. By 1997, that figure had risen to 480. *Id.*

[14] For example, 38,731 (or 62%) of 62,533 Title VII charges resolved in 1997 resulted in a "no reasonable cause" determination that allowed the charging party to sue. That year, only 6,397 (or 10.2% of) Title VII charges brought to the EEOC were resolved in some way. These numbers are striking when compared to the outcome of employers' ADR systems. For example, at one company, between 80 and 90 percent of employment disputes are resolved within two months or less of entering the employer's ADR system. *See ADR* in the Workplace, GAO/CCD-97-157, at 40.

the parties and witnesses have been irreversibly colored and polarized by years of conflict. . . . Emotional and economic damages that did not exist at the time of the dispute have accumulated, compounded, and assumed an importance far out of proportion to the nature of the dispute." William L. Bedman, *Alternative Dispute Resolution: The Brown & Root Experience, in* The Face of Conflict in the Workplace: The Future of Employment ADR (American Arbitration Association National Employment Conclave, Sept. 22, 1995).

Thus, as Chief Justice Burger put it, a holding that limits enforceability of a voluntary agreement to arbitrate statutory claims "runs counter to every study and every exhortation of the Judiciary, the Executive, and the Congress urging the establishment of reasonable mechanisms to keep matters of this kind out of the courts." *Barrentine*, 450 U.S. at 752.

The Ninth Circuit's decision threatens both employers' administration of alternative dispute resolution programs, and the otherwise uniform body of law that had developed among the circuit courts with respect to the enforceability of mandatory agreements to arbitrate statutory civil rights claims, including Title VII disputes. This critical departure opens new avenues of attack by opponents of arbitration, undermining the relative speed of arbitration over traditional court suits, and inviting new litigation over an indivdual's state of mind under the Ninth Circuit's subjective "desirability" standard for arbitrating Title VII disputes. The strong national policy favoring arbitration would not be served by such a result. "Congress' clear intent, in the Arbitration Act, [is] to move the parties to an arbitrable dispute out of court and into arbitration as quickly as possible." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

CONCLUSION

For the reasons discussed above, the *amicus curiae* Equal Employment Advisory Council respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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